

EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TVIIM, LLC,)
Plaintiff)
vs.)
MCAFEE, INC.,) Case No. 3:13-CV-04545-VC
Defendant)

ORAL VIDEOTAPE DEPOSITION of LANCE E.
GUNDERSON, taken before Ryan K. Black, CLR,
RPR, Notary Public, in and for the District
of Columbia, at the offices of Wilmer Cutler
Pickering Hale and Dorr, LLP, 1875 Pennsylvania,
NW, Washington, D.C., on Tuesday, February 24,
2015, commencing at 7:57 a.m.

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1 is -- is -- that's -- that's the best benchmark
2 we have, was the actual transaction involving
3 the technology. So that's really the -- the
4 basis for that opinion.

5 Q. So then why raise -- why have the --
6 the range up to a hundred thousand dollars, if
7 you're saying here that the -- the -- you can't
8 -- you can't conceive of how it would be higher
9 than 10?

10 A. To -- to give a little bit of wiggle
11 room, I guess, in terms of what a license would
12 be.

13 There were other some other data
14 points, as well, that -- that indicated,
15 potentially, transactions that were higher. But
16 they involved other -- other stuff, I would say,
17 and included the patent that is actually issued
18 in this case.

19 Q. What data points are you talking
20 about?

21 A. Well, there was a \$125,000
22 transaction, I think. Let me look at my report
23 here.

24 Early on in my report, I've got a
25 little chart here that -- yeah, it was the

1 Innerwall transaction for \$125,000, so there was
2 that transaction that also involved the -- the
3 patent.

4 Q. Did it involve the patent? The patent
5 hadn't issued -- hadn't issued at that point,
6 had it?

7 A. Well, the application, I suppose.

8 Q. Well, is an application worth the same
9 amount as a patent?

10 A. It has value. I would say it is worth
11 more once it -- the patent actually issues.

12 Q. Okay. And what -- that -- that
13 transaction was in what year?

14 A. I want to say 2007. I could be -- I
15 could be off here. I don't know.

16 I have it in my report here.

17 (Deposition Exhibit No. 319, a
18 document titled, Purchase Software Agreement,
19 dated September 1st, 2002, signed by Mr. Ricotta
20 and Mr. Doll, was marked.)

21 BY MR. SHAEFFER:

22 Q. I'll mark as Exhibit 319, just to
23 make life easier for you, a document called
24 Software Purchase Agreement, dated September
25 1st, 2002, --

1 the transaction --

2 A. Yeah. Cards are dealt face-up. They
3 would, too.

4 Q. They would know, as well?

5 A. Right.

6 Q. And it's your opinion that that
7 valuation would be of economic comparability,
8 the idea of McAfee selling millions of units
9 of the patented technology is economically
10 compatible with a joint venture to attempt to
11 otherwise monetize these products?

12 A. Absolutely, because at those times,
13 they had the technology and they certainly knew
14 who the players in the market were. And if
15 they -- they thought that people were using the
16 technology -- I mean, it was the -- the value of
17 the technology at the time, and they were aware
18 of the players in the market. McAfee was there
19 at the time. McAfee was selling products at the
20 time that the patent issued, so they would know,
21 or should know.

22 Q. And EIM contemplated getting 50
23 percent of whatever was able to be obtained
24 from McAfee at the time they entered the joint
25 venture transaction, did they not?

1 A. Absolutely.

2 Q. And you consider this joint venture
3 EIM buying a lottery ticket?

4 A. In many ways, yes. They're trying to
5 strike -- they're trying to strike it rich. And
6 they're trying to throw these patents in there,
7 and they're trying to sue people to try to get,
8 you know, this huge payout of -- from -- from, I
9 guess, McAfee in this case, or anybody else they
10 tried to -- decided to sue.

11 Q. And -- and that lottery ticket is
12 economically comparable to a large company
13 wanting to put your technology into millions of
14 units of product?

15 A. I don't know -- what I would say
16 is, that in terms of valuing the technology
17 and determining what a lump sum would be, it's
18 certainly comparable -- it's certainly relevant,
19 rather, to look at what was paid for the
20 technology. And in this instance, the entire
21 patent was -- was contributed for the fair
22 market value of \$10,000.

23 Q. And we're just getting back to
24 the simple point. You understand under the
25 Georgia-Pacific factors, when you're looking at

1 licenses, you're supposed to be looking at
2 economically comparable licenses?

3 A. I do, and I think this is -- this is
4 comparable and relevant.

5 Q. It's comparable?

6 A. Yes.

7 Q. Okay.

8 A. Yes. It's -- and relevant to the
9 question of what the value of the technology
10 was.

11 Q. Do you -- I understand, in terms of
12 what the value of the technology was, but in
13 your -- other than that it is information
14 relevant to the value of the technology, are
15 the two transactions economically comparable?

16 A. I believe that -- that the first
17 transaction, the TVIIM transaction, is certainly
18 relevant as to what the transaction would be
19 with McAfee in the hypothetical negotiation.

20 Q. And I appreciate that, but I'm just
21 using from the Georgia-Pacific factors when
22 you're looking at other transactions that
23 transactions need to be economically comparable.
24 And I'm just trying to ensure that it is your
25 testimony, and your opinion in this case, that

1 the joint venture agreement, that you've
2 referred to as a lottery ticket, is economically
3 comparable to McAfee incorporating this
4 technology into its products?

5 A. Given the de minimis value of the
6 technology itself, yes, I believe they're
7 economically comparable.

8 Q. Okay. And it's solely based, then, on
9 the de minimis value of the technology?

10 A. It's based on the actual transactions
11 that -- that -- that have occurred, and they are
12 consistent with what I believe a hypothetical
13 negotiation would come up with, given the de
14 minimis value that McAfee perceived with the
15 technology to add to its product.

16 Q. And I guess we're just having a -- an
17 issue in nomenclature.

18 I understand that you say that you
19 understand and look at this joint venture
20 agreement as providing a fair market value of
21 the technology, correct?

22 A. Yes.

23 Q. Okay. And independent -- if you take
24 the dollar number out of that transaction, is a
25 joint venture agreement to pursue litigation on

1 a patent an economically comparable transaction
2 to a transaction where a large corporation
3 intends to put the technology into its patent,
4 into its products, millions of units of its
5 products? Are those economic -- independent of
6 the dollar figures in them, are those
7 economically comparable transactions?

8 A. And what I would say is, at the
9 hypothetical negotiation, McAfee and -- and
10 EIM have the cards dealt face up, and that
11 transaction is very consistent with the de
12 minimis value that McAfee valued the technology
13 that was going to go into those products.

14 Q. And we're moving from the dollar value
15 in the joint venture. I'm just asking you a
16 more specific question. Is a joint venture to
17 pursue patent litigation involving technology an
18 economically comparable transaction to a large
19 corporation wanting to put the technology in
20 millions of units of its products?

21 A. Yes. I believe they are economically
22 comparable, because, at the time of the joint
23 venture, they knew who they were going to
24 pursue, they would have knowledge about what the
25 value -- you know, what would lead to the value

1 that they had. So, yes, I believe that they
2 are.

3 Q. So at -- at -- at the time they
4 entered the transaction, they knew they were
5 going to sue McAfee?

6 A. They certainly had some idea that
7 there were targets out there that they were
8 going to go after. Otherwise, they wouldn't
9 have done the transaction, in my opinion.

10 Q. And what do you base that on?

11 A. Just logic, if nothing else.

12 Q. But you haven't -- you haven't seen
13 anything in the records that you reviewed, or
14 the facts you reviewed, that indicates that, at
15 the time the joint venture was entered into, the
16 parties had knowledge of the extent of use by
17 third parties of the patented technology?

18 A. Well, it -- it doesn't take a rocket
19 scientist to go out to the publicly available
20 information and look at all the different
21 companies out there. And I certainly have a
22 belief that they knew there were millions of
23 copies of -- of various types of antivirus
24 software out there, and they had some knowledge
25 as to who they might be able to go after. I

1 license for that technology to a manufacturer?

2 A. You keep using the word compatible.
3 Do you mean comparable?

4 Q. Do the two words mean the same thing
5 to you?

6 A. I think they're slightly different,
7 but --

8 Q. Which would you prefer I use?

9 A. Comparable.

10 Q. Comparable?

11 A. Well, I mean, you can use whatever
12 word you want.

13 Q. If you prefer comparable, I'll use
14 comparable.

15 Would a -- is a joint venture
16 involving technology necessarily comparable to
17 a license of that technology to a manufacturer?

18 A. I guess it depends on the facts and
19 circumstances.

20 Q. Okay. So it may or may not be
21 comparable?

22 A. It may or may not be.

23 Q. Okay. And my question now is,
24 looking at your report, can you show me the
25 facts that you rely upon to show that any of

1 the transactions involving the '168 patent
2 are comparable to a license of that patent --
3 economically comparable? I know they involve
4 the same technology. Economically comparable
5 to the hypothetical license to McAfee?

6 A. Okay. Let me take a look here.

7 So I'm on Page 19. I'm starting to
8 read through this -- these various transactions,
9 the DMW transaction and the Innerwall
10 transaction, I guess.

11 So each one of these things -- each
12 one of these transactions actually involve more
13 -- you know, economically involve more than just
14 the patent at issue. So in -- in that sense,
15 they provide a ceiling or a cap, I would say.

16 So, you know, for example, on Page 23,
17 it's talking about the EIM transaction 2007.
18 And it talks about all the different rights they
19 got with this transaction. So they got -- you
20 know, I have it listed out here on Page 23, all
21 versions of Secure Enclave, so they've got some
22 software; all versions of Stilleto, and that's
23 software. They've got the '168 patent, the
24 patent we're talking about here; four U.S Patent
25 applications; the Innerwall trademark; and

1 hardware, which primarily consists of computer
2 equipment. And so those are the assets.

3 So from an economic comparability
4 standpoint, I would say that, if anything, they
5 got more than just the '168 patent, clearly.
6 And the value, if anything, of the '168 patent,
7 would be something less. So in terms of
8 economic comparability, I would say that this
9 puts a ceiling on what the value of the '168
10 patent is.

11 So -- and the other transactions are
12 similar, in that each of the transactions, with
13 the exception of the last one, the TVIIM
14 transaction, involves software and involve a
15 lot of other stuff.

16 The TVIIM transaction was a little
17 bit more narrow. It involved three patents and
18 three patent applications.

19 Q. So other than the things people got in
20 the transactions involving the '168 patent, is
21 there anything -- any other factual support in
22 your report for the economic comparability or
23 comparability of the -- those transactions with
24 the hypothetical negotiation with McAfee?

25 A. Well, again, these -- these parties,

1 opposed to answering yes or no.

2 A. I -- I think that's consistent with my
3 understanding.

4 Q. Okay. And to the extent that the
5 hypothetical negotiation occurred during the
6 period of time that -- that EIM had its contract
7 with the Air Force, that would have a material
8 impact on your opinion, would it not?

9 A. I think my opinion -- my opinion would
10 be consistent whether or not the hypothetical
11 negotiation date was before or after that
12 cancellation of the contract. Because,
13 ultimately, we have these baselines of value,
14 in terms of what the -- the value of the -- you
15 know, what the maximum value is of the -- of the
16 technology.

17 We have -- we have, in various points
18 in time, and even if the -- the hypo date was a
19 year before January of 2013, when the \$10,000
20 transaction occurred, or three months before, I
21 think it would still be consistent, because,
22 from a Book of Wisdom standpoint, I can still
23 look forward and look at what the value was at
24 that time.

25 Q. But you've agreed with me a moment ago

1 would have done prior to what -- when they had
2 a problem? I guess I don't understand your
3 question, but I think it's speculative to say
4 what they -- what they would have done.

5 Q. Well, so -- so you -- if it -- if
6 it is determined, then, that the hypothetical
7 negotiation took place at a time prior to
8 sequestration, you have no opinion as to
9 what the license would be, do you?

10 MR. MUELLER: Objection.

11 THE WITNESS: No. That's not true.
12 I mean, my -- I think my opinion would be
13 consistent with what I've already said.

14 I think I would have the same opinion.

15 BY MR. SHAEFFER:

16 Q. Okay. And that's -- that's -- there
17 we go. Now I want to know what facts you have
18 that EIM would have licensed for the same --
19 licensed to McAfee for the same value it
20 attributed to its technology at the time of
21 the joint venture if the nego -- hypothetical
22 negotiation occurred prior to EIM being in
23 financial distress?

24 If you have the same opinion, you have
25 to have a fact as to why the financial distress